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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-5845

CATHERINE JACKSON, On Behalf of Herself and All Others Similarly Situated,

*Petitioner,*

v.

METROPOLITAN EDISON COMPANY, A Pennsylvania Corporation,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

## REPLY BRIEF FOR THE PETITIONER

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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## REPLY BRIEF FOR THE PETITIONER

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## ARGUMENT

### I.

### PETITIONER HAS STANDING TO BRING THIS ACTION

**A. Petitioner is entitled to bring this action because she is the Respondent's customer and is the real party in interest and the intended beneficiary and recipient of the Respondent's services.**

In its first argument, Respondent raises the issue of Petitioner's legitimacy to bring this action. This issue

was not raised in the lower courts, nor was it included in Respondent's brief in opposition to the Petition for the Writ of Certiorari.[1] Certainly, the failure of the district court and court of appeals to consider this obvious issue lends support to the apparent lack of significance of such issue.

There is no question that the Petitioner is a proper party to bring this action. Petitioner was the owner, occupant and prior billing party of the premises to which Respondent's electrical services were provided. (A-22). The Respondent was certainly aware of the above and provided service to the Petitioner as the beneficiary of the contract entered into between it and Dodson in September 1971. (A-23). Furthermore, after Dodson moved from the premises, the Respondent considered the Petitioner to be its customer and liable for the bill, as shown by the demand made by the Respondent's employee for $30.00 by the following Monday on October 11, 1971 (A-25). The fact that a written contract was not entered into at this point is irrelevant since Rule 1 of the Respondent's Tariff No. 41 provides that a written contract is not necessary to create a customer relationship (A-38).

In addition to having standing to sue as the customer or intended beneficiary of the service, the Petitioner acquired standing as an occupant with a legal interest in the premises who is also the intended recipient of the services. Thus, Respondent's statement on page 10 of its Brief that the Fourteenth Amendment protections

[1] See Rules 24(2) and 40(1)(d)(2) of the Rules of this Court as to timeliness of arguments.



apply to "persons" and not to "premises" not only appears to reassert the discredited personal v. property rights distinction which was struck down in *Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972), but also ignores the reality of the fact that Petitioner's personal rights are being denied by Respondent when it unconstitutionally deprives her of the property right to continued receipt of electrical services during a billing dispute.

To accept Respondent's argument that only the billing party has standing to contest a utility company's termination action is to maintain that a non-billing occupant has no legal interest in receipt of utility service. This position is not only contrary to common sense and to public policy, but is contrary to caselaw.[2] In this regard, since Respondent's challenged tariff requires that notice be provided prior to termination of

[2] In Pennsylvania, an incoming tenant cannot be held responsible for the bills of the former occupant of the premises. *Tyrone Gas and Water Co. v. Public Service Commission*, 77 Pa. Super. 292 (1921). See also, *Beaver Valley Water Co. v. Public Service Commission*, 70 Pa. Super. 621 (1918); *Pa. Chautauqua v. Public Service Commission of Pa.*, 105 Pa. Super. 160 (1932). Similarly, courts have held that a tenant who is the non-billing party, has standing to challenge the termination of utility service to his or her premises without prior notice and opportunity to be heard when the landlord billing party refuses or fails to pay the bill. *Jackson v. Northern States Power Co.*, 343 F. Supp. 265 (D. Minn., 1972); *Davis v. Weir*, 328 F. Supp. 317, 359 F. Supp. 1023 (N.D. Ga., 1971, 1973), affirmed 497 F.2d 139 (5th Cir., 1974) at 145, where the Court noted that the "Department's actions offend not only equal protection of the laws but also due process."

service for nonpayment of a bill, it is submitted that such notice, in order to be meaningful and pass constitutional muster, must be furnished to the occupant of the premises. *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306 (1950); *Davis v. Weir*, 328 F. Supp. 317, 359 F. Supp. 1023 (N.D. Ga., 1971, 1973), affirmed 497 F.2d 139 (5th Cir., 1974).

As an occupant with a legal interest in said premises, Petitioner is the customer and real party in interest, with standing to bring this action regardless of whether or not she was the prior billing party.

## II.

## RESPONDENT'S BRIEF FAILS TO PROVIDE A COMPREHENSIVE ANALYSIS OF THE CUMULATIVE EFFECTS OF THE VARIOUS INDICIA OF STATE ACTION.

### A. A multi-dimensional approach is required.

In its brief, and contrary to the rule of *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961) and *Moose Lodge 107 v. Irvis*, 407 U.S. 163 (1972), Respondent seeks to avoid a finding of state action by treating the various indices of state action separately and in a vacuum. Rather, Petitioner submits that it is consideration of the cumulative effect of the several indices of state action that is required for a determination that ostensibly private conduct is taken under color of law. Thus, a finding of state action is required when specific governmental interests are



furthered by challenged conduct which is extensively regulated, authorized and approved by the state.

In this case the several indices of state action are integrally related to the conduct challenged. Hence, Respondent's status as a state sanctioned monopoly enables it to threaten to terminate a customer's services without fear of loss of competitive advantage. The fact that Respondent performs a public function in furnishing electrical services furthers the state's interest in assuring the reasonably continuous supply of services at a reasonable price to its citizens. See 66 Pa. Stat. Anno. §1171. The joint participation of the Commonwealth with the Respondent results in mutual benefits to each party, in that the Respondent derives a State guaranteed rate of return and is permitted to operate without significant competition, while the Commonwealth benefits from the efficient operation of the Respondent's activities and receives direct tax revenues therefrom. In addition, the Commonwealth derives an economic benefit when it delegates quasi judicial authority to the Respondent to adjudicate billing disputes and to deprive customers of property. Finally, the Commonwealth regulates and specifically authorizes, encourages, and approves the particular conduct challenged.

The thrust of Respondent's brief is not only to attempt to discredit the Petitioner's argument by isolating the various indices of state action, but also to utilize the "floodgates" argument for its *in terrorem* effect. Respondent implies that a finding of state action herein will result in a complete breakdown of the distinction between essentially private conduct and public action. However, in so doing, Respondent applies

Petitioner's argument out of context in this regard. State action need not be found solely because of state licensing or regulation, but instead, results where, in addition to the above, the conduct challenged promotes state interests and is authorized by the state which acts as a partner in such conduct.[3]

**B. The necessary indicia of state action are present in this case so as to require a finding that Respondent acted under color of law when it terminated Petitioner's electrical services.**

In its brief, Respondent mistakenly attempts to isolate, distinguish or minimize the importance of the various indicia of state action set forth in Petitioner's brief.

**1. The state specifically approved the particular conduct challenged herein because Respondent's proposed termination of service tariff was passed by the Public Utility Commission following public hearings.**

On pages 24-25 of its brief, Respondent notes that in 1971 it filed proposed tariffs for a rate increase with

[3] Although failing to find state action where a bank set off an indebtedness against the checking account of a depositor, the First Circuit Court of Appeals noted that there was "little parallel" between a closely regulated bank and a public utility which has been chosen by the state to carry out a specific governmental objective. *Fletcher v. Rhode Island Hospital Trust National Bank*, 496 F.2d 927, 932 (C.A. 1, 1974).



the Public Utility Commission. In its proposed tariff the Respondent included certain of its prior tariffs, including Rule No. 15, the termination of service tariff. Hearings were then held before the Commission from September 30, 1971 to March 10, 1972. The Commission granted a rate increase and did not order a change in Respondent's other regulations.

It is apparent from the above that the Commission considered and gave specific approval to Respondent's termination of service tariff. In *Public Utilities Commission v. Pollak*, 343 U.S. 451 (1952) state action resulted where the District of Columbia Public Utility Commission held hearings and specifically approved the challenged action. Respondent's challenged activity thus falls within the doctrine of *Pollak, supra*, and requires a finding of state action thereunder. *See Moose Lodge 107 v. Irvis, supra.*

**2. Respondent performs a public function, which constitutes one index of state action.**

Respondent contends that it does not perform a public function because the Commonwealth of Pennsylvania allegedly had no common law duty to furnish utility services to its citizens (Resp. Br., 11). Whether or not the Commonwealth originally had such a duty is immaterial, since, in passing the Public Utility Law, the Commonwealth in fact assumed an obligation to assure that its citizens receive reasonably continuous utility services at reasonable rates. 66 Pa. Stat. Anno. §1141,

§1171.[4] *See also Munn v. Illinois*, 94 U.S. 113 (1877). Furthermore, conduct undertaken pursuant to common law "custom or usage" is certainly state action. *See Adickes v. S.H. Kress Co.*, 398 U.S. 144 (1970); *Reitman v. Mulkey*, 387 U.S. 369 (1967).

In addition to the above noted public function, the Respondent also performs a public function through the exercise of quasi-judicial authority delegated to it by the Commonwealth. Respondent can thus determine the lawfulness of its own regulations, adjudicate disputes between itself and its customers, and effect a seizure of property interests by terminating a customer's electrical services.

**3. Pervasive state regulation of the conduct challenged is a significant index of state action.**

Respondent charges that the distinction between public and private action will be destroyed if a finding of state action may rest upon the sole fact of a state regulatory scheme in a particular case. (Resp. Br., 14). However, Respondent misstates Petitioner's argument in this regard. Petitioner asserts only that a finding of state action is required where it is found that the state benefits from challenged conduct which it

[4]The cases cited by Respondent in support of its position, predate the enactment of the Public Utility Law. *Girard Life Insurance Co. v. The City of Philadelphia*, 88 Pa. 393 (1879); *Baily v. Philadelphia*, 184 Pa. 594, 39 A. 494 (1898).



regulates, encourages and authorizes.[5] See *Moose Lodge v. Irvis, supra*. Thus, as noted by the district court herein, the state must be involved not simply with some activity of the institution alleged to have inflicted injury upon a plaintiff, but with "the activity that caused the injury" (A-71). *See also Kadlec v. Illinois Bell Telephone Co.*, 407 F.2d 624 (C.A. 7, 1969) cert. den., 396 U.S. 846 (1969). Certainly, as noted above, the Commonwealth of Pennsylvania is so significantly involved in the Respondent's termination activity as to warrant a finding of state action.

**4. Respondent is a monopoly whose challenged activity herein is authorized by and promotes the interests of the Commonwealth of Pennsylvania.**

Respondent disputes Petitioner's characterization of it as a "state sanctioned monopoly" (Resp. Br., 15). Certainly, such a characterization cannot now be seriously disputed in view of *Gilmore v. City of*

[5]Hence, the mere fact that a state may regulate restaurants in general would not warrant a finding of state action in a situation involving excessive prices if the challenged prices are not specifically authorized by the state, but might very well warrant a finding of state action in a situation where the state authorizes restaurants to engage in challenged racial discrimination. See *Lombard v. Louisiana*, 373 U.S. 67 (1963).

*Montgomery, Alabama*, 94 S.Ct. 2416 (1974).[6] Furthermore, it is apparent that the above characterization of Respondent is fully supported by the finding of the Pennsylvania Public Utility Commission, as recently as March 25, 1974 when it granted the Respondent a rate increase of over $18 million.[7]

[6] In *Gilmore, supra*, this Court noted that:

"Traditional state monopolies, such as electricity, water, and police and fire protection–all generalized governmental services–do not by their mere provision constitute a showing of state involvement in invidious discriminations." *Supra*, 2426.

It should be noted that Petitioner's legal position is fully consistent with the above statement, since state action is present herein not because Respondent is a state granted monopoly, but because the Respondent's monopoly status enables it to effectuate state interests and facilitates termination of a customer's services.

[7] In its Order of March 25, 1974, at R.I.D. 64, *P.U.C. et al v. Metropolitan Edison Co.*,–P.U.R. 4th–, the Commission noted that:

"Respondent was incorporated under the laws of Pennsylvania on July 24, 1922, and is a subsidiary of General Public Utilities Corporation (G.P.U.), a holding company registered under the Public Utility Holding Company Act of 1935. G.P.U. now owns all the common stock of three operating electric subsidiaries; namely respondent, Pennsylvania Electric Company, and Jersey Central Power and Light Company, which form a fully integrated power pool. G.P.U. is a member of the Pennsylvania - New Jersey - Maryland (P.J.M.) inter-connection, which consists of twelve operating utility companies combined into six member systems. Respondent participates in P.J.M. as a subsidiary of G.P.U. . . ."

*(continued)*



Respondent's monopoly status is significant because it is by virtue of such state granted status that it is enabled to successfully threaten to terminate Petitioner's service with impunity. In addition, the fact that Respondent's monopoly status promotes certain state interests is significant in the consideration of the existence of state action. *See Railway Employees' Department v. Hanson*, 351 U.S. 225 (1956); *Lathrop v. Donahue*, 367 U.S. 830 (1961).

**5. The fact that Respondent's activities are subject to some Federal regulation is not incompatible with a finding of action under color of state law with regard to termination of service for nonpayment of a bill.**

Respondent seeks to exempt itself from a state action analysis merely because it is subject to some Federal regulation (Resp. Br., 16). However, the fact that Respondent is subject to some Federal regulation does not negate the fact that it is also extensively regulated by the Commonwealth of Pennsylvania. Whether Respondent may be considered as acting on behalf of the state in a particular situation depends upon how extensively the state is involved in that

"At August 31, 1972, respondent furnished electric service to 312,188 customers located in all or portions of four cities, 92 boroughs, and 155 townships located within 14 counties in eastern and central Pennsylvania. The service area comprises approximately 3,300 square miles or seven per cent of the entire state, with an estimated population of 826,400 at December 31, 1972." *Supra*, pp. 4-5.

particular conduct.[8] As noted above, the Commonwealth of Pennsylvania is significantly involved in the Respondent's challenged termination activity.

**6. Respondent's actions constitute the effectuation of state policies which are repugnant to the Constitution.**

On page 18 of its brief, Respondent suggests that a finding of state action should be confined only to cases involving racial discrimination. Such a suggestion certainly lacks merit especially in light of the history of the Civil Rights Act, 42 U.S.C. §1983, the purpose of which was to provide protection not only for former slaves, but for all people who were deprived of federal rights under color of state law. Cong. Globe, 42nd Cong., 1st Sess., App. 68 (1871). See also *Mitchum v. Foster*, 407 U.S. 224 (1972); *Lynch v. Household Finance Corp., supra*. Thus, this Court has decided numerous state action cases not involving racial discrimination. See *Public Utilities Commission v. Pollak, supra; United States v. Williams*, 341 U.S. 97 (1950); *Railway Employees Dept. v. Hanson, supra; Lathrop v. Donohue, supra; Marsh v. Alabama*, 326 U.S. 502 (1946).

[8] *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), noted by Respondent on page 17 of its brief, is fully consistant with this position, since in that case, Otter Tail was not exempt from anti-trust action where its particular complained of conduct was not subject to specific state governmental regulation or authorization.



Respondent correctly notes that there must be a nexus between the state and its relationship with the challenged activity for state action purposes. (Resp. Br., 19). However, Respondent incorrectly states that Pennsylvania law does not command or approve Respondent's summary termination action. (Resp. Br., 20). By authorizing Respondent's termination of service tariff, No. 41, Rule 15, through prior enactment of Sections 202(d) and 401 of the Public Utility Code, 66 Pa. Stat. Anno. §§1122, 1171, and, as further authorized by Public Utility Commission Tariff Regulation No. VIII and Electric Regulation Rule 14D, the Commonwealth of Pennsylvania has expressly sanctioned the Respondent's challenged activities. Furthermore, the fact that the Public Utility Commission actually held formal hearings in 1971 and 1972 regarding Respondent's proposed rate increase and various other proposed tariffs, including Rule 15, the very rule challenged herein, brings this case within the doctrine of *Public Utilities Commission v. Pollak, supra*, so as to justify a finding of state action based on the express and formal approval by the state of the challenged termination activity.

**7. The fact that Respondent's revenues are subject to the Utilities Gross Receipts Tax is one index of state action.**

Payment of taxes in itself need not justify a finding of state action. (Resp. Br., 26). However, the Utilities

Gross Receipts Tax, 72 P.S. §8101 et seq., is not an ordinary tax paid by all corporations, but instead, is a unique tax paid only by public utilities, based upon gross revenues. Thus, the state directly benefits from payment of said tax as reflected in increased company revenues resulting from threatened utility terminations.

Respondent is correct in its position that the Utilities Gross Receipts Tax is no different from the 5% profit sharing arrangement recognized as prominent for state action purposes in *Ihrke v. Northern States Power Co.*, 459 F.2d 566 (8th Cir., 1972), vacated for mootness, 409 U.S. 815 (1972). (Resp. Br., 26). However, it should be noted in this regard that the finding of state action in *Ihrke, supra,* was based not only on such profit sharing arrangement between the utility and the City of St. Paul, but upon a variety of state action indicia, including extensive regulatory review of the utility's tariffs and pervasive governmental regulation of the utility's activities. Such factors, as noted above, are abundantly present in the instant case.

**8. In employing the authority of the Commonwealth to terminate Petitioner's electrical services, it is immaterial for state action purposes that the Respondent did not enter upon Petitioner's premises.**

As noted above, contrary to Respondent's assertion (Resp. Br., 26), Respondent did terminate Petitioner's electrical service pursuant to state authorization. The fact that this termination was accomplished without



entry on Petitioner's premises is irrelevant, since the issue is whether the Respondent may terminate services without due process of law in the first instance. The means by which such service is terminated is not significant.[9]

**9. Granting Petitioner due process of law will not deprive the Respondent of due process of law.**

Respondent asserts that Petitioner seeks to use the federal courts to compel Respondent to furnish free service to its customers (Resp. Br., 28). This statement certainly misconstrues the nature of this action. At no time has Petitioner asserted that she should be provided with free service. Indeed, although Respondent has refused to bill Petitioner for services following the commencement of this action (Resp. Br., 9), Petitioner has placed funds aside for her estimated electric bills pending termination of this action. Accordingly, Petitioner seeks to assure only that utility services not be terminated without due process of law for failure to pay a disputed bill.[10] Petitioner does not seek to avoid

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[9] Respondent's tariffs authorizing entry on private property to terminate service were authorized by Commission Rule 14D and Commission Regulation No. VIII, and were subject to the approval of the Commission.

[10] The requirement of a prior hearing, as mandated by *Fuentes v. Shevin*, 407 U.S. 67 (1972), in the absence of "extraordinary circumstances", *Boddie v. Connecticut*, 401 U.S. 371 (1971), is not modified by *Arnett v. Kennedy*, 40 L.Ed.2d 15 (1974), or by *Mitchell v. W.T. Grant Co.*, 40 L.Ed.2d 406 (1974).

*(continued)*

payment of the current bill pending resolution of a disputed bill.

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*Arnett v. Kennedy, supra,* involved the termination of a public employment situation where rights could be adequately vindicated by a post hearing review and where adequate administrative remedies were available. It should be noted in that case that six members of this Court adhered to the concept that "the adequacy of statutory procedures for deprivation of a statutorily created property interest must be analyzed in constitutional terms". *Arnett v. Kennedy, supra* (Opinion of Mr. Justice Powell, concurring in part and concurring in the result in part). Furthermore, such property interests are not "created by the Constitution"; rather, they are created and their dimensions are defined by existing rules that "stem from state laws." *Board of Regents v. Roth,* 408 U.S. 564 (1972) at 577. Such property interests are created and defined by the Pa. Public Utility Law, 66 Pa. Stat. Anno. §1171, in the instant case. In balancing the individual's property interests in due process of law against the competing interests of the state, factors such as the individual's "brutal need" and "being driven to the wall" must be afforded important consideration. *Arnett v. Kennedy,* (opinion of Mr. Justice White, concurring in part and dissenting in part) 40 L.Ed.2d at 54-55. Certainly, such factors are present in the instant case.

The case of *Mitchell v. W.T. Grant, supra,* involved a creditor replevin situation specifically distinguishable from *Fuentes supra,* in that, due to fear of disposal or waste by the debtor of the creditor's property, the creditor would be permitted to temporarily seize such property pursuant to a closely supervised procedure under control of the court from beginning to end, in which a sworn affidavit and petition is presented to and approved by a judge, following posting of a bond. This procedure also allows for return of the property to the debtor and an immediate hearing upon posting of a counterbond by the debtor, upon whom the "impact" of a temporary deprivation is not

*(continued)*



Respondent asserts that the tremendous hardship that would allegedly be imposed upon it by requiring it to afford customers the opportunity to resolve disputed bills before their services are terminated justifies a continued denial of the constitutional rights of such customers. Certainly, any added costs of administration must be subordinate to consideration of whether due process is to be provided in the first instance. See *Bell v. Burson,* 402 U.S. 535 (1971). Only after a determination is made that due process is required may consideration be given to what type of process is in fact due, following a "balancing" of the circumstances. *Board of Regents v. Roth,* 408 U.S. 564 (1972).

In this case, although due process requires that customers be afforded a prior opportunity to resolve disputes, the actual nature of the dispute resolution procedure may vary depending upon the circumstances of the case, and may be informal in the first instance. Contrary to Respondent's expressed fears, Petitioner does not seek to impose an "inflexible" hearing requirement in every case. (Resp. Br., 28). Hence, the requirement of providing a conference with a company official or an informal hearing at the company level would seem to be an inexpensive method of resolving disputes. *See Amicus Brief* of the Public Service

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great. Such situation has little applicability to the instant case, where the temporary deprivation of utility services following a summary and unsupervised termination may affect life itself. *Palmer v. Columbia Gas of Ohio,* 342 F. Supp. 241 (N.D. Ohio, W.D., 1972), affirmed 479 F.2d 153 (C.A. 6, 1973).

Commission of New York.[11] Certainly, the requirement of a formal hearing conducted by the Public Utility Commission following the failure of the utility company to satisfactorily resolve the dispute, would not involve such extensive costs as to make such procedure economically infeasible or constitutionally prohibitive.[12] Finally, the cost involved in disposing of administrative appeals cannot outweigh due process requirements. *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Shapiro v. Thompson*, 394 U.S. 618 (1969). Thus, when presented with the very argument that the utility would suffer an undue financial burden if required to comport with due process of law, the Fifth Circuit Court of Appeals stated:

> "Finally, in view of the concededly small number of similar applicants, the miniscule percentage of the Department's revenue that is affected, the minimal cost of instituting constitutionally sufficient procedures, and the availability of other collection methods, we hold the City has failed to demonstrate any substantial detriment to its revenue bond rating." *Davis v. Weir, supra*, 497 F.2d at 145.

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[11] See also "Re Rules and Regulations Governing the Disconnection of Utility Services", of the Vermont Public Service Board, 2 P.U.R. 4th 209 (April 19, 1974) at 218.

[12] It should be expressly noted that at the time of this action, as well as at present, neither the Respondent's tariffs nor the Public Utility Commission's regulations provided for any formal method of dispute resolution prior to the termination of a customer's utility services.



## CONCLUSION

For the foregoing reasons, Petitioner respectfully urges that this Court reverse the Judgment and Opinion of the Court below.

Respectfully submitted,

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